

**COUNTY OF SAN LUIS OBISPO BOARD OF SUPERVISORS
AGENDA ITEM TRANSMITTAL**

(1) DEPARTMENT Planning and Building	(2) MEETING DATE 2/10/2015	(3) CONTACT/PHONE Airlin M. Singewald, Senior Planner / (805) 781-5198	
(4) SUBJECT Hearing to determine the extent of the “vested rights” of claimants Negranti & Sons and Mainini Management Company LLC to conduct surface mining and quarrying at the mine known as the Cayucos Pit and /or the Whale Rock Pit (CA Mine ID # 91-40-0010), located approximately 4,000 feet northeast of the intersection of Montecito Road and Old Creek Road, pursuant to Public Resources Code section 2776. This item was continued from November 25, 2014. District 2.			
(5) RECOMMENDED ACTION It is recommended that the Board adopt and direct the Chairperson to sign the resolution setting forth a determination of established vested right(s) at the Whale Rock Pit / Cayucos Pit – CA Mine ID #91-40-0010 located at 1424 Old Creek Road, east of the community of Cayucos including the scope and nature of surface mining activities included within the established vested right(s), as follows: 1. Vested Rights associated with the Limits of the Mining Area shall be limited to the area described as “Parcel 3D plus the area of use before the date the use became non-conforming” as shown in Attachment A (refer to Figure 7). 2. Vested Rights associated with the Maximum Annual Production include the right to produce an amount of material that corresponds to market demand, so long as the amount does not substantially exceed the amount of materials extracted in past years sufficient to constitute a substantial change in operations. 3. Vested Rights associated with the Type of Mining shall be those activities that are required for the type of material encountered in the vested mining area and necessary to produce the various products for the consumption area.			
(6) FUNDING SOURCE(S) Current Budget	(7) CURRENT YEAR FINANCIAL IMPACT \$0.00	(8) ANNUAL FINANCIAL IMPACT \$0.00	(9) BUDGETED? Yes
(10) AGENDA PLACEMENT <input type="checkbox"/> Consent <input type="checkbox"/> Presentation <input checked="" type="checkbox"/> Hearing (Time Est. <u>75 minutes</u>) <input type="checkbox"/> Board Business (Time Est. <u> </u>)			
(11) EXECUTED DOCUMENTS <input checked="" type="checkbox"/> Resolutions <input type="checkbox"/> Contracts <input type="checkbox"/> Ordinances <input type="checkbox"/> N/A			
(12) OUTLINE AGREEMENT REQUISITION NUMBER (OAR) N/A		(13) BUDGET ADJUSTMENT REQUIRED? BAR ID Number: <input type="checkbox"/> 4/5 Vote Required <input checked="" type="checkbox"/> N/A	
(14) LOCATION MAP Attached	(15) BUSINESS IMPACT STATEMENT? No	(16) AGENDA ITEM HISTORY <input type="checkbox"/> N/A Date: <u>6/17/14, 10/21/14, 11/25/14</u>	
(17) ADMINISTRATIVE OFFICE REVIEW Lisa Howe			
(18) SUPERVISOR DISTRICT(S) District 2			

County of San Luis Obispo



TO: Board of Supervisors

FROM: Planning and Building / Airlin M. Singewald, Senior Planner

VIA: Ellen Carroll, Planning Manager / Environmental Coordinator

DATE: 2/10/2015

SUBJECT: Hearing to determine the extent of the “vested rights” of claimants Negranti & Sons and Mainini Management Company LLC to conduct surface mining and quarrying at the mine known as the Cayucos Pit and /or the Whale Rock Pit (CA Mine ID # 91-40-0010), located approximately 4,000 feet northeast of the intersection of Montecito Road and Old Creek Road, pursuant to Public Resources Code section 2776. This item was continued from November 25, 2014. District 2.

RECOMMENDATION

It is recommended that the Board adopt and direct the Chairperson to sign the resolution setting forth a determination of established vested right(s) at the Whale Rock Pit / Cayucos Pit – CA Mine ID #91-40-0010 located at 1424 Old Creek Road, east of the community of Cayucos including the scope and nature of surface mining activities included within the established vested right(s), as follows:

1. Vested Rights associated with the **Limits of the Mining Area** shall be limited to the area described as “Parcel 3D plus the area of use before the date the use became non-conforming” as shown in Attachment A (refer to Figure 7).
2. Vested Rights associated with the **Maximum Annual Production** include the right to produce an amount of material that corresponds to market demand, so long as the amount does not substantially exceed the amount of materials extracted in past years sufficient to constitute a substantial change in operations.
3. Vested Rights associated with the **Type of Mining** shall be those activities that are required for the type of material encountered in the vested mining area and necessary to produce the various products for the consumption area.

DISCUSSION

The Surface Mining and Reclamation Act (“SMARA” or the “Act”) was enacted by the State Legislature in 1975 to regulate surface mining operations in the state. Under that Act, existing surface mining operations were allowed to continue mining without a permit to the extent they had obtained vested rights to do so prior to January 1, 1976. The Whale Rock Pit, located east of Cayucos, is one such surface mine in the County that began operations prior to January 1, 1976. The purpose of this hearing is to identify the extent and scope of the Whale Rock Pit’s vested rights, as that term has been defined by SMARA, the California Code of Regulations, the County’s Land Use Ordinance (Title 22), and applicable case law *Hansen Brothers Enterprises, Inc. v. County of Nevada* (1996) 12 Cal.4th 533 (“*Hansen Brothers*”).

Staff Comments

Staff recognizes that the Operator wishes to expand the existing mining operation. In response to a lawsuit and Stipulated Judgment filed January 3, 2014 (refer to Attachment B), this Vested Rights Hearing has been initiated. Once the vested rights have been determined, permit requirements and compliance can be determined by Staff.

Immediately prior to the June 17, 2014 hearing, Staff was provided with additional information by the Applicant that represents objective intent to mine a larger portion of the site than was previously available in the County files. This information was also presented to members of the Board at the time of the hearing and is part of the record. This additional information, plus materials provided by the Applicant since that time, have led Staff to revise the original recommendation presented in the June 17, 2014 Staff Report. This recommendation is based on the County Land Use Ordinance and the California Supreme Court decision in *Hansen Brothers Enterprises, Inc. v. County of Nevada* (1996) 12 Cal.4th 533 ("*Hansen Brothers*").

The Applicant and Staff have had numerous discussions since the June 17, 2014 hearing and come to an agreement regarding two of the three items related to vested mining rights at the Whale Rock Pit. At this time, one item remains in contention regarding the Vested Mining Rights. This issue, along with the two items that the Applicant and Staff have come to a tentative agreement upon is discussed herein.

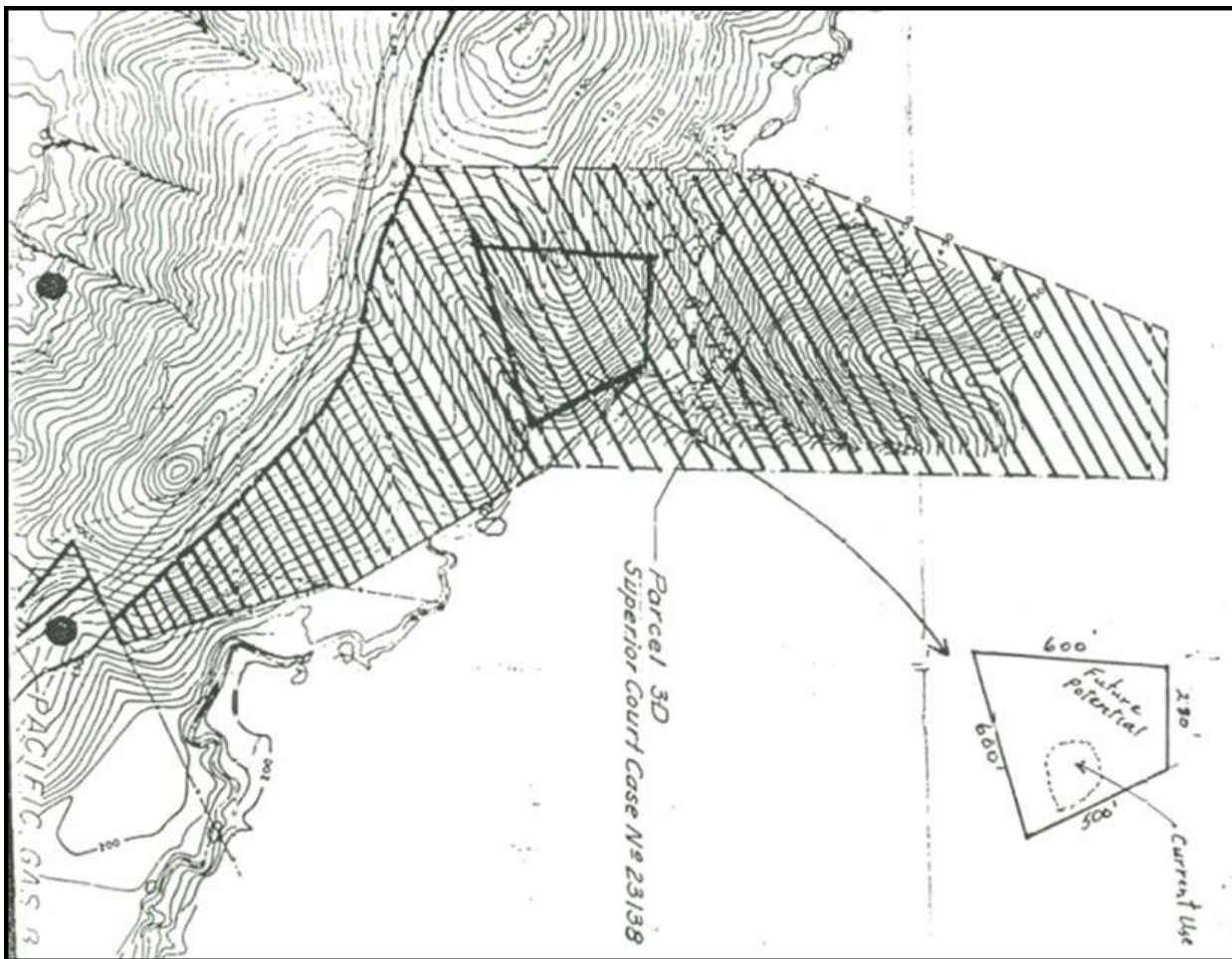


Figure 1 - Parcel 3D (as shown in Official Reclamation Plan Documents).

Background

The property at issue is currently known as the Whale Rock Pit and is located at 1424 Old Creek Road, east of the community of Cayucos (approximately 4,000 feet northeast of the intersection of Montecito Road and Old Creek Road). The parcel on which the mine is located is approximately 235 acres and is located southeast of Whale Rock Reservoir. In

1958 the State Department of Water Resources (DWR) obtained an “Order of Immediate Possession” for the quarry property and on April 29, 1959 DWR finalized eminent domain proceedings over numerous parcels including the quarry property. The Interlocutory Judgment in Condemnation of Parcels 3A, 3B, 3C and 3D granted DWR a five-year “*profit a prendre*” to remove rock from the quarry property (see Figure 1 - Parcel 3D) for construction of the Whale Rock Reservoir. It is unclear as to the exact date when mining began on the subject parcel. According to the County Certificate of Vested Rights Application for the mine known as the “*Cayucos Pit*”, the history of mining operations were described as “*excavation looking for the rock face*” beginning sometime in 1958. Figure 1 is a map found in the approved Reclamation Plan which was created as part of the above referenced condemnation process then modified for use in the Reclamation Plan. The map was submitted as part of the Reclamation Plan application and is relevant to this determination hearing because it represents *objective evidence of the future mining activities* (refer to Figure 2 for the location of Parcel 3D relative to 2011 mining activities).



Figure 2 - Parcel 3D overlaid on 2011 Aerial Photo. Source: Legal Description from Final Order of Condemnation file dated May 14, 1959.

Under both SMARA and Section 22.36.040 of the County Land Use Ordinance, the Whale Rock Pit is considered a non-conforming use of land because no use permit has been obtained to authorize surface mining on the subject property. If it was established legally at a time when no permits were required, the County’s ordinary non-conforming use ordinance (Section 22.72.050) would allow the mine to continue operating so long as the use was not enlarged, increased, discontinued, or *extended to occupy greater area of land* than was occupied when it became nonconforming. Under SMARA and California case law, however, surface mines are treated differently – they may establish a vested right to expand or move into areas not previously mined without being considered non-conforming.¹

¹ The Board is being requested to make this determination through a noticed, public hearing process pursuant to the Court of Appeal’s decision in *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613.

Hansen Brothers

The California Supreme Court decided in *Hansen Brothers* that surface mining operations may establish a vested right to mine into areas not previously mined pursuant to the “diminishing asset doctrine.” Under the diminishing asset doctrine, a mining operation may establish a vested right to expand into a new area where **“there is objective evidence of the owner’s intent to expand [the] mining operation, and that intent existed at the time of the zoning change.”** (*Hansen Brothers*, 12 Cal.4th at p. 553; see also 14 Cal. Code of Reg. § 3951.)

Courts have looked at a number of indicators of intent when evaluating the extent of a vested right under the diminishing asset doctrine, including evidence of the following activities prior to the vesting date:

- stockpiling
- haul roads
- exploratory drilling
- mineral surveys
- pre-mining site preparation
- scale of operations
- extent of land ownership
- actual disturbance
- progressive expansion over time

The most critical factor, however, is the “nature of the initial nonconforming use” at the time the restrictive ordinance became effective (*Hansen Brothers*, 12 Cal.4th at p. 557). As stated in *Hansen*:

- “The determining factor is whether the nature of the initial nonconforming use, in light of the character and adaptability to such use of the entire parcel, manifestly implies that the entire property was appropriate to such use prior to adoption of the restrictive zoning ordinance.” (*Id.*)



Figure 3 – Excerpt from D.L. Ingles Appraisal Report showing mineral resources as well as springs and water troughs associated with the existing grazing activities.

Limits of the Mining Area: The site plan (refer to Figure 1) which is included in the approved Reclamation Plan #M800403:2, shows the approximate boundaries of the site the County recommends for vested rights. This site plan, along with additional information submitted by the Applicant (and discussed in more detail below), provides the *objective evidence of the owner's intent to expand the mining operation* which has been relied upon in determining the limits of the vested mining rights. Figure 1 is sourced from the approved Reclamation Plan and also represents the limits of Parcel 3D that was condemned by DWR for the purpose of mining (also refer to Figure 2) in 1959. This area represents the portion of the larger 235 acre parcel where identified mineral deposits have been verified to exist with objective evidence. This evidence includes the D.L. Ingles Appraisal Report and DWR Notice to Contractors documents (refer to Figure 3 and 4) which was submitted into the record by the Applicant, immediately prior to the June 17, 2014 hearing and as a part of the Applicant's PowerPoint presentation.



Figure 4 - DWR Notice to Contractors document mineral maps overlaid on Aerial Photo

The Applicant has stated that exploration beyond Parcel 3D had occurred prior to the use becoming non-conforming which would suggest a larger area of vesting mining rights. It was stated during the June 17, 2014 hearing (also included in the Applicant's PowerPoint Presentation), that a road was constructed near the southern property boundary to look for mineral resources on the larger 235 acre parcel in the late 1960's (refer to Attachment E – Slides 8 and 9). Based on Staff's review of this information, the identified road appears to provide access to historic springs and water troughs (refer to Figure 3) which are identified in the D.L. Ingles Appraisal Report prepared in 1958. These springs and water troughs were associated with the historic cattle operation on the larger parcel. No disturbance associated with mining exploration south of parcel 3D can be identified on historic aerial photos and no other objective evidence has been presented that suggests this area was used for mining. Only the development the road, spring, water trough, and water tanks are visible on historic aerial photos, and some of these items are present as early as 1963 (refer to Figure 5). During the June 17, 2014 hearing, it was suggested that this road was developed around 1969 but the road appears in aerial photos as early as 1963. County Staff has not seen evidence of any mining activities in the location that has been identified near the southern property boundary (refer to Attachment E – Slide 9) during the annual inspections of the quarry; and the operator has never indicated that mining previously occurred in that location during the annual inspections.

Based on review of historic ordinances, the use became non-conforming in 1970. Vested rights could not be granted for the entire 235 acre parcel (during any of the previous ordinances governing mining activities in the County) because a Conditional Use Permit would have been required for the entire parcel since the parcel is located within 1,000 feet of Montecito Road (refer to Figure 5 and 6 from the June 17, 2014 Staff Report). Since Parcel 3D was located farther than 1,000 feet from Montecito Road (at the time the use became non-conforming), only this area or some smaller portion of the 235 acre parcel (where objective evidence has been presented) can be determined to be vested. The DWR condemnation document acknowledges the potential to mine all of Parcel 3D but no other portion of the 235 acre parcel.

In addition, the 235 acre parcel is subject to a Land Conservation Act Contract, entered into by Angelo and Anna Mainini on January 26, 1976 (refer to Attachment D). That contract requires the parcel to be maintained for agricultural use and states "the placement of the subject property in an agricultural preserve and the execution and approval of the Contract is deemed to be a determination that the highest and best use of the property during the term of the Contract and any renewal thereof is for agricultural uses." While surface mining is considered a potentially compatible use within the Land

Conservation Act, the fact that the entire parcel is under contract indicates intent to maintain the parcel for agriculture rather than entirely for mining.

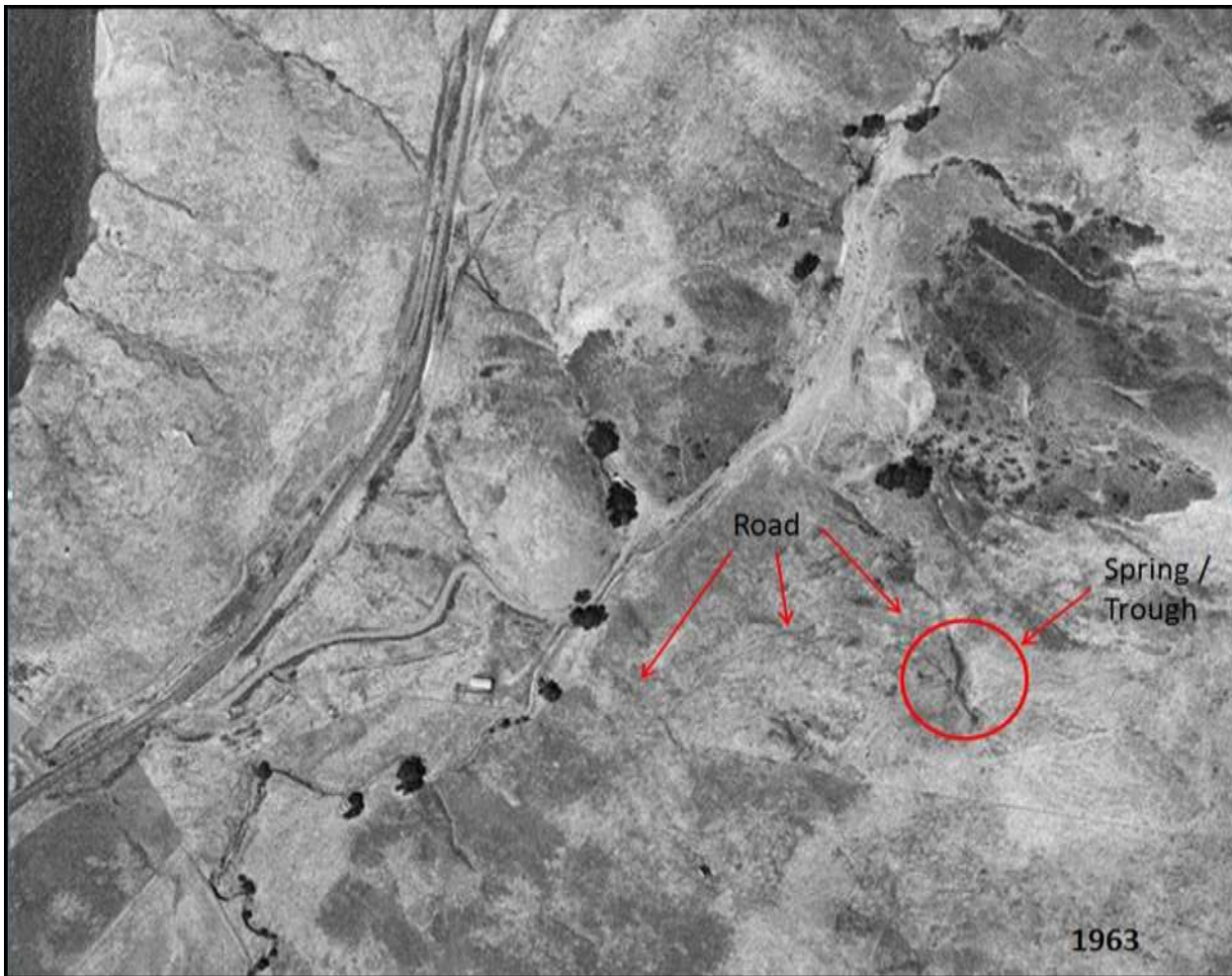


Figure 5 – Historic on-site Road. Source: Applicant's Power-Point Presentation (June 17, 2014)

Stockpiling of material on the northern / upper portion of the project site outside of Parcel 3D (refer to Figure 2) began in the early 2000s. This activity began long after the use became non-conforming (1970) and would not enlarge the area of vested rights by virtue of historic use (which is required prior to a use becoming non-conforming). Aerial photos from as late as 1999 show no stockpiling of material in this location. Therefore, Staff has determined that the area where stockpiling is occurring on the northwest (upper) portion of the site should not be included in the vested mining rights (refer to Figure 6).



Figure 6 – Recent Stockpiling Location

Historic use in the valley bottom along the creek including the creation of the dam, the lake, and the area of currently used for stockpiling below the dam do appear to have been actively used in historic aerial photos as early as the 1960's. The dam appears to have been created to allow work within the valley bottom associated with mining activities by holding back the flow of water in areas where mining was occurring downstream (refer to Attachment E – Slides 8 and 9). An additional area of usage near the barn, south of the entrance road is also evident in historic aerial photos (refer to Figure 5 and 7). While the area near the barn likely also served the ongoing cattle grazing operation on the larger parcel, it has been used for parking of equipment associated with the mining operation in more recent times. Due to this historic use of this area, while not a part of the area identified for mining in the DWR documents and other evidence presented by the Applicant, usage for mining purposes represents objective intent to use this area for future mining related activities. Staff recommends that these additional areas be included as a part of the vested mining area.

No additional objective evidence has been presented that would suggest there was an intent to mine beyond the boundaries of Parcel 3D plus the area of use before the date the use became non-conforming (refer to Figure 7) which has resulted in the recommended determination presented below.



Figure 7 - Proposed Vested Mining Area

According to the diminishing assets doctrine (as discussed above), actual expansion over time should be done gradually and as part of an objective and apparent plan to mine the entire area. In this situation at the Whale Rock Pit, mining has not increased in a gradual and consistent manner, nor has it grown consistent with regional population growth. According to information in the County mining files and information presented by the operator (refer to Figure 8 and Attachment E – Slide 15), a significant production increase occurred between 1990 and 2005 which is beyond the date the use became non-conforming (1970).

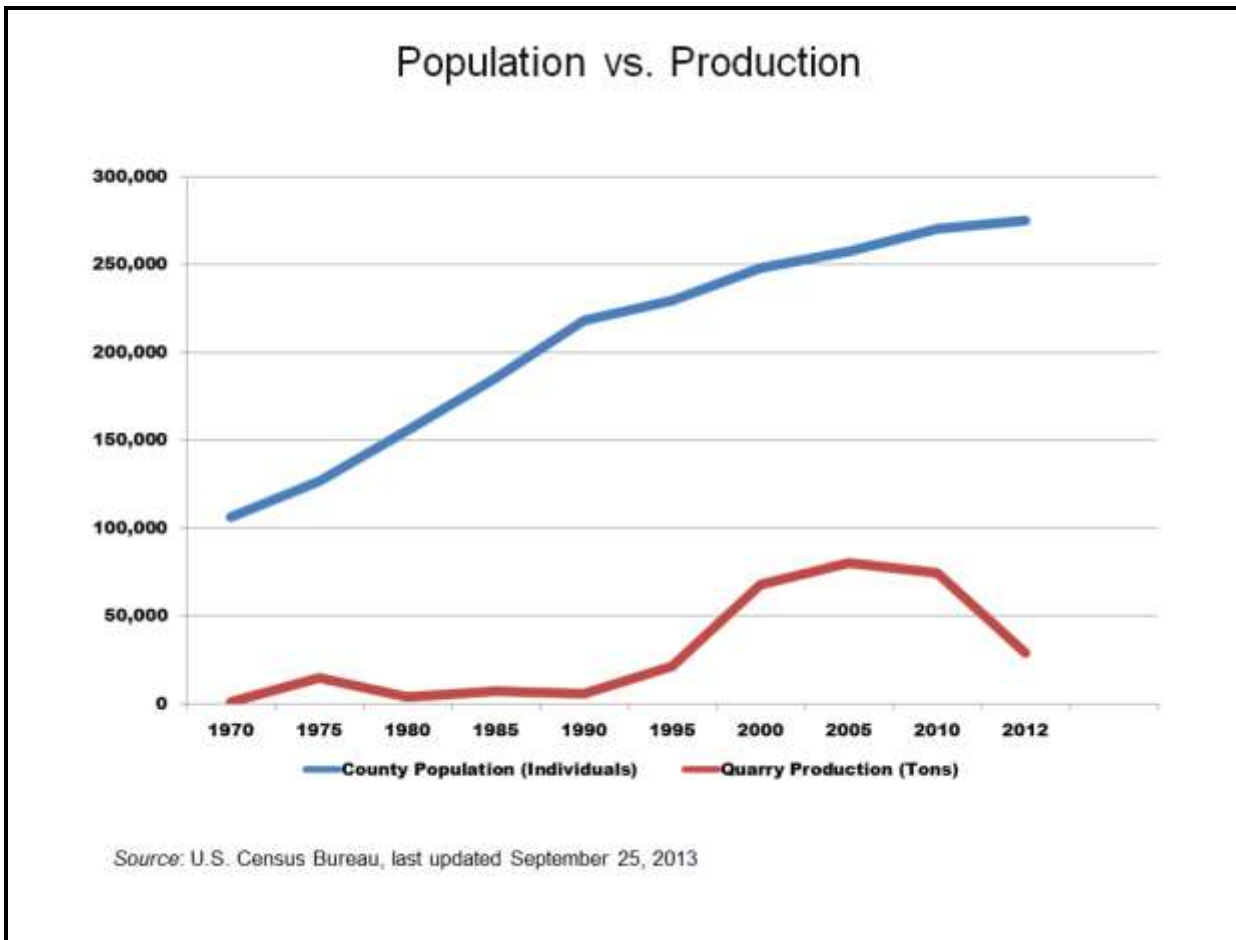


Figure 8 – Whale Rock Pit Population vs. Production graph

1. **Recommended Determination – Limits of the Mining Area:**

Vested Rights associated with the ***Limits of the Mining Area*** shall be limited to the area described as “Parcel 3D plus the area of use before the date the use became non-conforming” as shown in Attachment A (refer to Figure 7).

Maximum Annual Production: After further evaluation, staff agrees that the maximum annual production associated with the Whale Rock Pit should be allowed to increase over time in manner that is roughly proportionate to the increase in population growth of the area being served by the quarry or general increase in demand for aggregate resources. If production quantities increase in a manner that exceeds the population growth of the region being served by the quarry or general demand for aggregate in the region, this may constitute an impermissible intensification of the use. If production at the quarry immediately and substantially exceeds production in prior years, the County may seek to restrict this increase at the time such increase in production occurs.

An increase in population generally creates an increase in demand for aggregate in the area where growth is occurring. Staff agrees that, pursuant to *Hansen Brothers*, an increase in production to meet the demand would not be considered an intensification of use or an expansion of the non-conforming use except as discussed above.

2. **Recommended Determination – Maximum Annual Production:**

Vested Rights associated with the ***Maximum Annual Production*** include the right to produce an amount of material that corresponds to market demand, so long as the amount does not substantially exceed the amount of materials extracted in past years sufficient to constitute a substantial change in operations.

Type of Mining: Upon further examination, staff agrees that, consistent with *Hansen Brothers*, the types of mining that may occur at the Whale Rock Pit should be those activities that are necessary to quarry the material within the vested

mining area. The type of mining (modernization or addition of equipment) allowed should be those that are normally incidental and auxiliary to the non-conforming use (refer to Figure 9). Staff recommends that operational changes made in conjunction with the non-conforming use be considered not necessarily an unlawful expansion of the non-conforming use.



Figure 9 - Current Processing Activities. Source: Operator

Similar to the natural and gradual increase allowed in production to accommodate growth and demand in the area of the quarry, processing facilities may also increase to accommodate the increased production so long as they are part of the overall mining operation established as a vested right.

3. **Recommended Determination – Type of Mining:**

Vested Rights associated with the **Type of Mining** shall be those activities that are required for the type of material encountered in the vested mining area and necessary to produce the various products for the consumption area.

Conclusion:

Staff recommends that the Board recognize vested rights consistent with the diminishing asset doctrine but only to the extent that the operator has provided *objective evidence of the owner's intent to expand the mining operation* at or before the time the use became non-conforming. Based on the evidence contained in the above referenced mining files and as presented by the Operator, the recommended determination for vested mining rights is contained in the following section.

Recommended Determinations:

1. Vested Rights associated with the ***Limits of the Mining Area*** shall be limited to the area described as “Parcel 3D plus the area of use before the date the use became non-conforming” as shown in Attachment A (refer to Figure 7).
2. Vested Rights associated with the ***Maximum Annual Production*** include the right to produce an amount of material that corresponds to market demand, so long as the amount does not substantially exceed the amount of materials extracted in past years sufficient to constitute a substantial change in operations.
3. Vested Rights associated with the ***Type of Mining*** shall be those activities that are required for the type of material encountered in the vested mining area and necessary to produce the various products for the consumption area.

OTHER AGENCY INVOLVEMENT/IMPACT

Other agencies and county departments involved in this project include (but are not limited to):

- County Counsel

FINANCIAL CONSIDERATIONS

This Vested Rights hearing was directed by a Stipulated Judgment from the Superior Court (Case Number: CV 130157) and no fees were paid associated with this hearing. Staff costs associated with the Vested Rights determination is covered by the Planning Department General Fund allocation.

RESULTS

Adoption of the attached Resolution (refer to Attachment C), would determine the Operator’s vested right to continue and expand its mining operation pursuant to the diminishing asset doctrine and in accordance with the Stipulated Judgment.

ATTACHMENTS

- A. Proposed Vested Mining Area
- B. Stipulated Judgment
- C. Resolution
- D. Land Conservation Act Contract
- E. Negranti Vested Rights Presentation
- F. June 17, 2014 Applicant Letter and Attachments
- G. August 20, 2014 Applicant Letter and Attachments
- H. September 5, 2014 (1) Applicant Letter and Attachments
- I. September 5, 2014 (2) Applicant Letter and Attachments